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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 21

THE UNITED STATES, PETITIONER

vs.

ATLANTIC MUTUAL INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 12, 1935

CERTIORARI GRANTED MAY 20, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 869

THE UNITED STATES, PETITIONER

vs.

ATLANTIC MUTUAL INSURANCE COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In Court of Claims of the United States

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ATLANTIC MUTUAL INSURANCE COMPANY, CLAIMANT

Against

UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed February 18, 1929

TO THE COURT OF CLAIMS:

The claimant, Atlantic Mutual Insurance Company, respectfully shows to this honorable court as follows:

First. At all the times hereinafter mentioned the claimant, Atlantic Mutual Insurance Company, was and still is a corporation duly organized and existing under the laws of the State of New York, with its principal office at No. 49–51 Wall Street, New York City, New York, and duly authorized by its charter and by the law of the State of New York to underwrite marine insurance risks, including fire, upon goods.

Second. On information and belief, at all the times hereinafter mentioned the defendant United States of America was the owner of and operating and in control of the transport "Logan."

Third. On or before the 5th day of December 1918 the
2 claimant made a contract of insurance with, and in consideration of a premium paid or agreed to be paid, issued to the Manila Railroad Company, a policy of insurance against marine perils, including fire, covering a certain shipment of goods owned by the Manila Railroad Company to be carried upon said transport "Logan" from San Francisco, California, sailing in the month of December 1918, to Manila, Philippine Islands.

Fourth. On or before the 5th day of December 1918 the claimant made a contract of insurance with, and in consideration of a premium paid or agreed to be paid, issued to the Government of the Philippine Islands, a policy of insurance against marine perils, including fire, covering a certain shipment of goods owned by the Government of the Philippine Islands, to be carried on the said transport "Logan" from San Francisco, California, sailing in December 1918, to Manila, Philippine Islands.

Fifth. Upon information and belief, both of said shipments of goods were loaded on the said transport "Logan" at San Francisco, California, on or before December 5, 1918, and were received on board said transport by the duly authorized representative of the defendant for carriage to Manila, and the defendant agreed to carry

the same from the Port of San Francisco to Manila, Philippine Islands.

Upon information and belief, on or about the 5th day of December 1918, said transport "Logan" sailed from the Port of San Francisco, California, for Manila, Philippine Islands, with both of said shipments of goods, together with other goods, on board.

3 Sixth. Upon information and belief, on or about the 16th day of December 1918, and again on or about the 22nd day of December 1918 fire broke out in no. 1 lower hold of said transport "Logan" while said transport was at sea in the Pacific Ocean, and on each said occasion water was poured into said hold to extinguish said fire and to prevent the total loss of said vessel and her cargo. Said fires were thereby extinguished but said water badly damaged the said shipments of goods referred to in paragraphs "third" and "fourth" hereof.

Seventh. Upon information and belief, upon arrival of said transport "Logan" at Manila, Philippine Islands, her cargo was discharged at said port. At said port, however, the master of said transport permitted all the cargo on board said transport to be unloaded and to be delivered to the owners and/or consignees thereof without requiring or obtaining from said owners and/or consignees any bond or bonds to secure the payment of general average by said goods.

Eighth. Thereafter claims were presented to the Atlantic Mutual Insurance Company by or on behalf of the government of the Philippine Islands and the Manila Railroad Company for the amounts of their respective losses upon their said shipments of goods, as due and payable to them under said policies of insurance by reason of the facts aforesaid. Thereafter the Atlantic Mutual Insurance Company, pursuant to said claims and policies of insurance, made payments as follows: On September 17, 1919, $3,263 was paid on account to the government of the Philippine

4 Islands; on April 16, 1920, $25,000 was paid on account to the government of the Philippine Islands; and on April 12, 1921, the sum of $9,326.80 was paid to the government of the Philippine Islands, and $1,407.22 was paid to the Manila Railroad Company. The aforesaid sums constituted payment in full of all losses claimed by each of said assured under said policies.

Ninth. By reason of the facts aforesaid, all claims of the government of the Philippine Islands and of the Manila Railroad Company, respectively, against the defendant for contribution in general average arising out of the facts hereinabove alleged, were transferred by operation of law to, and became vested in, the Atlantic Mutual Insurance Company by subrogation and the Atlantic Mutual Insurance Company became entitled to bring suit in its own name for recovery of such general average contributions.

Tenth. Thereafter and on or about May 6, 1920, the Chief of the Transport Service of the War Department wrote to the Chief

of the Bureau of Insular Affairs, stating that the War Department would bear its share of any general average adjustment made to cargo by reason of the facts aforesaid. A copy of said letter is annexed hereto and marked "Exhibit A."

Eleventh. The claimant herein thereafter and on or about March 15, 1921, presented to the defendant herein claim and demand for payment of the general average contribution owing to the claimant herein by reason of the facts aforesaid. Thereafter

5 hearing were held by a board of inquiry of the War Department, which board denied the claim. The cause was thereafter reviewed, however, by the Judge Advocate General, who reversed the decision of the said board of inquiry and held that general average was properly payable to the claimant herein.

Twelfth. Thereupon and in or about the month of August 1922 the War Department requested Johnson & Higgins, average adjusters, to prepare a general average statement covering all general average contributions to be paid and/or received by reason of the facts hereinabove alleged. Johnson & Higgins undertook the preparation of a general average statement, and completed said statement and issued the same on or about December 31, 1926.

Said general average statement stated the contributory values of the various interests involved in said general average on said voyage of the said transport "Logan" as follows:

Hull: The contributory value of said vessel in sound condition was stated to be	$475,000
Cargo:	
Cargo shipped by the War Department of the defendant	669,068
Cargo of the American Red Cross	260,331
Cargo of the Philippine Islands Government and the Manila Railroad Company	190,503
Personal property of Colonel S. E. Allen	1,851
Personal property of Knute A. Johnston	445

6 The foregoing contributory values included the amounts to be made good in general average.

Said general average statement also showed that net contributions were to be paid as follows:

By the War Department of the defendant for miscellaneous cargo owned by it	$19,971.81
By the American Red Cross for miscellaneous cargo	12,174.66
By the defendant herein as owner of the hull of the transport "Logan"	22,213.88
Total	54,360.35

Said general average statement also showed that net contributions were to be received as follows:

For miscellaneous cargo owned by the government of the Philippine Islands and the Manila Railroad Company (to which sums the claimant herein is entitled by subrogation as hereinabove alleged)	$28,099.46
Colonel S. E. Allen, for personal property	1,429.25
Knute A. Johnston, for personal property	644.76
To Johnson & Higgins for fee and disbursements in preparing statement	2,365.12
To ditto for commissions as settling agents	1,821.82
	54,360.35

7 Thirteenth. Upon information and belief, the computation and statement of general average as contained in said statement prepared and issued by Johnson & Higgins is true and correct, and correctly states the amounts of general average contribution due and owing by and to the respective interests as therein shown.

Fourteenth. Thereafter and on or about May 28, 1928, the General Accounting Office notified the claimant herein that its said claim for allowance and payment of general average had been rejected. A copy of said notice is annexed hereto and marked "Exhibit B."

Fifteenth. Thereafter the claimant made application to the General Accounting Office for a reivew of the disallowance of said claim and for the allowance of said claim as a valid debt and obligation of the defendant herein. On or about December 10, 1928, the Comptroller General of the United States notified the claimant herein that the disallowance of said claim had been sustained, and refused, on behalf of the defendant, to pay said claim or any part thereof.

Sixteenth. The claimant and the government of the Philippine Islands and the Manila Railroad Company have always borne true allegiance to the Government of the United States, and have not in any way aided, abetted or encouraged any rebellion against the United States. No assignment or transfer of this claim or of any part thereof or interest therein has been made by any person
8 whatsoever except as stated herein. The claimant is justly entitled to the amount herein claimed, after allowing all just credits and offsets. No action upon this claim other than hereinbefore set forth has been taken before Congress or any department of the Government, or in any court; nor has the claimant assigned said claim or any part thereof to any person whatsoever.

Seventeenth. The premises considered, your claimant prays that judgment be entered in favor of the Atlantic Mutual Insurance Company against the United States of America in the sum of forty-eight thousand ninety-nine and 40/100 dollars ($48,099.40), together with interest at the rate of six percent (6%) per annum thereon from the 31st day of December 1926, and for such other and further relief as may be required.

CARTER, LEDYARD & MILBURN,
Proctors for Claimant.
54 Wall Street, Borough of Manhattan, City of New York.
HEBER SMITH,
Counsel.

9 [*Duly sworn to by Cornelius Eldert, jurat omitted in printing.*]

10 *Exhibit A to petition*

WAR DEPARTMENT,
TRANSPORTATION SERVICE,
Washington, May 6, 1920.

File No. T. S. 579.14 "Logan."
From: Chief of Transportation Service.
To: Chief, Bureau of Insular Affairs, Washington, D. C.
Subject: Damage to shipment on board U. S. A. T. "Logan."

1. Your letter of April 27, 1920, addressed to the Quartermaster General, U. S. Army, has been referred to this office for reply.

2. It is desired to advise that the War Department will bear its share of any general average adjustment made on account of loss by fire of cargo on the U. S. A. T. "Logan."

3. The matter is now in the course of investigation with the view of ascertaining the amount, if any, properly attributable to general average loss. Until this is definitely ascertained it is impossible to say what proportion the War Department will agree to bear as a general average contribution.

FRANK T. HINES,
Brigadier General, U. S. A.
Chief of Transportation Service.

11 *Exhibit B to petition*

General Accounting Office Division. Form 7009. In reply refer to certificate no. ——.

Notice of disallowance of claim, civil

GENERAL ACCOUNTING OFFICE,
CLAIMS DIVISION,
Washington, D. C., May 28, 1928.

Claim No. 0187408.
ATLANTIC MUTUAL INSURANCE CO.
% Carter, Ledyard & Milburn,
54 Wall Street, New York, N. Y.

Your claim(s) for $48,099.40, contribution in general average as insurers of the property of Philippine Islands government and the Manila Railroad Company damaged by fire on board the U. S. A. T. "Logan" on or about December 18, 1918, has (have) been examined and disallowed, per the above certificate number, for the following reasons:

There is no liability on the government for general average contribution for cargo lost or damaged in connection with fires which occurred on the U. S. A. T. "Logan" in December 1918, as the
12 vessel and all cargo aboard were property of the United States.

Therefore the claimants, as insurers of the cargo consigned to the Philippine Islands government and the Manila Railroad,

are not entitled to contribution in general average which would be the equivalent to the United States paying for the loss of property on which it carried insurance against such loss.

J. R. McCARL,
Comptroller General.
By ORLANDO F. SYKES.

sdp

If a claimant desires a review of this settlement, or any item thereof, application should be filed with a statement of the reasons therefor, within one year from the date hereof, in the Division, General Accounting Office, and same will be transmitted to the Law Division, Office of Comptroller General, for review.

13 II. *History of proceedings*

On March 11, 1929, the defendant filed a motion to dismiss the petition.

On March 30, 1929, the plaintiff filed an affidavit in opposition to said motion.

On May 6, 1929, the defendant's motion to dismiss was overruled, in open court, and the case remanded to the general docket.

III. *General traverse*

Filed by leave of Court September 3, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

The United States further pleads the action is barred upon limitation grounds.

HERMAN J. GALLOWAY,
Assistant Attorney General.

IV. *Further proceedings in the case*

On September 9, 1933, the defendant filed a motion for leave to file a motion to dismiss the petition.

On September 18, 1933, the plaintiff filed its opposition to said motion.

On September 22, 1933, the defendant filed a reply to said opposition.

On September 26, 1933, the motion for leave to file a motion to dismiss was ordered to the Law Calendar.

On October 9, 1933, the motion was argued and submitted.

On October 18, 1933, the motion was overruled without prejudice.

14 V. *Argument and submission on merits*

On January 9, 1934, the case was argued and submitted on merits by Mr. J. M. Richardson Lyeth, for plaintiff, and by Mr. J. Frank Staley, for defendant.

VI. *Special findings of fact, conclusion of law, and opinion of the court by Whaley, J.*

Filed November 5, 1934

Mr. J. M. Richardson Lyeth for the plaintiff. Mr. Rush Taggart and Carter, Ledyard & Milburn were on the briefs.

Mr. J. Frank Staley with whom was Mr. Assistant Attorney General Frank J. Wideman for the defendant. Mr. Lucian Y. Ray was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special findings of fact

1. The plaintiff, Atlantic Mutual Insurance Company, was at the times involved herein, and still is, a corporation duly organized and existing under the laws of the State of New York, with its principal office at no. 49–51 Wall Street, New York City, and duly authorized by its charter and by the law of the State of New York to underwrite marine insurance risks, including fire, upon goods.

The plaintiff in this action seeks to recover from the United States the sum of $48,099.40 alleged to be due for contribution in general average, by way of subrogation, as reimbursement of insurance moneys paid to the government of the Philippine Islands and the Manila Railroad Company (a Philippine government-owned corporation) to cover losses sustained on certain of their property, a part of which was jettisoned, burned, and damaged while being transported from the United States to the Philippine Islands in December 1918 on the United States Army transport "Logan."

2. The Philippine Islands are insular possessions of the United States and their affairs in the United States are under the administration of the Bureau of Insular Affairs. The Manila Railroad Company is a business corporation organized under the laws of the State of New Jersey and doing business in the Philippine Islands. All of its capital stock is owned by the government of the Philippine Islands.

During the period of the transactions here involved, purchases of supplies in the United States for the government of the Philippine Islands and its national railway, the Manila Railroad Com-
15 pany, were made by the Bureau of Insular Affairs of the War Department of the United States, which handled similar purchases for other possessions of the United States. The purchases

here involved were made by Harry L. Hershey, as purchasing agent, who worked under the direction and in the pay of the War Department, although reimbursement therefor was made by the Philippine and Puerto Rican governments.

3. The U. S. A. T. "Logan" was owned and operated by the United States and was used primarily for the carrying of Government supplies and the United States Army personnel, and their authorized allowances of baggage. It was operated by the Quartermaster's Department of the United States Army and/or the Army Transport Service. Its officers and crew were paid by the Quartermaster's Department of the War Department of the United States.

4. On December 5, 1918, the vessel sailed from San Francisco with cargo consigned to Vladivostok, Siberia, and the Philippine Islands. In addition to United States Government supplies there were being transported, free of charge, certain Red Cross supplies and cargo belonging to the government of the Philippine Islands and the Manila Railroad Company. The carriage of cargo for the Red Cross, the government of the Philippine Islands, and the Manila Railroad Company was arranged as a result of the war emergency which had necessitated the transfer of ships regularly operating in the commercial service in the Pacific to the Atlantic, and was subject to a notice posted on the bulletin board in the quartermaster's station at the dock at San Francisco, from which the transport "Logan" sailed upon the voyage in question, to the effect that the United States would use due care in handling goods on the transport but would not be responsible for them.

5. The shipments of goods hereinabove referred to as belonging to the government of the Philippine Islands and the Manila Railroad Company were loaded on the said transport "Logan" at San Francisco on or before December 5, 1918, and were received on board said transport by the duly authorized representative of the defendant for carriage to Manila, and the defendant undertook to carry the same from the port of San Francisco to Manila, Philippine Islands. No bill of lading was issued for either of said shipments, and the defendant did not require the payment of freight or an agreement to pay freight therefor. Both of said shipments of goods were on the transport "Logan" when she sailed from San Francisco on December 5, 1918, as hereinabove stated.

6. On or before the 5th of December 1918 plaintiff made a contract of insurance with, and, in consideration of a premium paid or agreed to be paid, issued to the Manila Railroad Company a policy of insurance against marine perils, including fire, covering a certain shipment of goods owned by the Manila Railroad Company to be carried upon said transport "Logan" from San Francisco, California, sailing in the month of December 1918 to Manila, Philippine Islands. Said goods consisted of miscellaneous supplies.

On or before December 5, 1918, plaintiff made a contract of insurance with, and, in consideration of a premium paid or agreed to be paid, issued to the government of the Philippine Islands, a policy

of insurance against marine perils, including fire, covering
16 a certain shipment of goods owned by the government of the Philippine Islands, to be carried on the said transport "Logan" from San Francisco, California, sailing in December 1918 to Manila, Philippine Islands. Said goods consisted of miscellaneous supplies—principally stationery, books, and medical supplies.

The insurance hereinabove referred to was procured on behalf of the government of the Philippine Islands and the Manila Railroad Company by said Harry L. Hershey as purchasing agent in the United States for the Government of the Philippine Islands and the Manila Railroad Company.

7. At 8:30 p. m. on December 16, 1918, when the transport was about 700 miles northwest of Honolulu, fire was discovered in its lower hold no. 1, which hold was loaded full with cargo. In order to extinguish the fire and to prevent a total loss of the vessel and her cargo, it was necessary to use steam and to flood the hold with water by hose from the deck and through the bilge pipes from the bottom. The cargo in this hold was badly damaged by fire and water, and parts of it had all identifying marks destroyed. On the morning of December 18th, after the fire had been extinguished, the debris and such of the cargo as was damaged to such an extent as to be considered worthless, was thrown overboard, and the transport proceeded on its way. On December 22nd fire broke out again in the same hold and was not completely extinguished until December 23rd, at which time additional damaged cargo was thrown overboard.

8. A board of officers appointed at sea to determine the origin of the fire found that it was due to spontaneous combustion caused by linseed oil coming in contact with packages of cotton bandages and cotton mattresses stowed in close proximity to the oil and paint. A second board of officers was convened after the transport arrived at destination to determine the cause of the fire and the extent of the damage to the cargo. This board verified the findings of the previous board that the fire was caused by spontaneous combustion and further found that the same was due to the negligence of no one.

9. The transport "Logan" arrived at Vladivostok January 4, 1919, and there discharged part of her cargo. Sailing thence she arrived at Manila January 19, 1919, where the remainder of her cargo was discharged. At said ports the master of the transport permitted the cargo to be unloaded and delivered to owners and consignees without requiring or obtaining from them any bond or bonds to secure the payment of general average.

10. Thereafter claims were presented to the Atlantic Mutual Insurance Company by or on behalf of the government of the Philippine Islands and the Manila Railroad Company for the amounts of their respective losses upon their said shipments of goods, as due and payable to them under said policies of insurance by reason of the facts aforesaid. Thereafter, the Atlantic Mutual Insurance Company, pursuant to said claims and policies of insurance, made pay-

ments as follows: On September 17, 1919, $3,263 was paid on account to the government of the Philippine Islands; on April 16, 1920, $25,000 was paid on account to the government of the Philippine Islands; and on April 12, 1921, the sum of $9,326.80 was paid to the government of the Philippine Islands, and $1,407.22 was paid to the Manila Railroad Company. The aforesaid sums, totaling
17 $38,997.02, constituted payment in full of all losses claimed by each of said assured under said policies.

11. Neither the Philippine government nor the Manila Railroad Company at any time presented a claim for loss or damage or general average to the United States Government covering the shipments made aboard the "Logan."

12. On May 6, 1920, Frank T. Hines, brigadier general, United States Army, and Chief of Transportation Service, addressed the following letter to the Chief, Bureau of Insular Affairs, Washington, D. C., on the subject of damage to shipment on board U. S. A. T. "Logan."

"Your letter of April 27, 1920, addressed to the quartermaster general, U. S. Army, has been referred to this office for reply.

"It is desired to advise that the War Department will bear its share of any general-average adjustment made on account of loss by fire of cargo on the U. S. A. T. 'Logan.'

"The matter is now in the course of investigation with the view of ascertaining the amount, if any, properly attributable to general-average loss. Until this is definitely ascertained it is impossible to say what proportion the War Department will agree to bear as a general-average contribution."

13. The plaintiff thereafter and on or about March 15, 1921, presented to the defendant claim and demand for payment of the general-average contribution alleged by plaintiff to be owing to it by reason of the facts aforesaid. Thereafter hearings were held by a board of inquiry of the War Department, which board denied the claim. The claim was thereafter reviewed by the Judge Advocate General, who reversed the decision of the board of inquiry and held that general average was properly payable to the plaintiff.

14. On August 22, 1922, the following letter was addressed to Johnson & Higgins, average adjusters, San Francisco, California, by the office of the general superintendent of the zone general-supply depot, Army Transport Service, War Department, Fort Mason, San Francisco, over the signature of Hugh Williams, captain, Q. M. C., administrative officer, A. T. S.:

"1. Enclosed is file of papers having reference to loss of cargo shipped from San Francisco to Vladiostok and Manila on the United States Army Transport 'Logan', voyage leaving San Francisco December 5th, 1918, the loss being caused by fire which occurred in the hold of the ship on December 16th and 17th, 1918.

"2. It is requested that the necessary action be taken to prepare a statement of general average in order that the responsibility of the various parties concerned may be determined."

Johnson & Higgins undertook the preparation of a general-average statement, and completed said statement and issued the same on or about December 31, 1926. A copy of the said statement of general average is in evidence as plaintiff's exhibit 8 and is by reference made a part hereof.

Said general-average statement stated the contributory values of the various interests involved in said general average on said voyage of the said transport "Logan" as follows:

Hull:	
The contributory value of said vessel in sound condition was stated to be	$475,000
Cargo:	
Cargo shipped by the War Department of the defendant	669,068
Cargo of the American Red Cross	260,331
Cargo of the Philippine Islands government and the Manila Railroad Company	190,503
Personal property of Colonel S. E. Allen	1,851
Personal property of Knute A. Johnston	445

Said general-average statement also showed that net contributions were to be paid as follows:

By the War Department for miscellaneous cargo owned by it	$19,971.81
By the American Red Cross for miscellaneous cargo	12,174.66
By the defendant as owner of the hull of the transport "Logan"	22,213.88
Total	54,360.35

Said general-average statement also showed that net contributions were to be received as follows:

For miscellaneous cargo owned by the government of the Philippine Islands and the Manila Railroad Co. (for which sums the plaintiff herein is suing in this suit)	$48,099.40
Colonel S. E. Allen, for personal property	1,429.25
Knute A. Johnston, for personal property	644.76
To Johnson & Higgins for fee and disbursements in preparing statement	2,365.[illegible]
To ditto for commissions as collecting and settling agents	1,821.[illegible]
Total	54,360.35

15. The computation and statement of general average as contained in said statement prepared and issued by Johnson & Higgins correctly states the amounts of the contributory values of the various interests involved in said general average on said voyage of the transport "Logan."

16. On or about May 28, 1928, the General Accounting Office notified the plaintiff herein that its said claim for allowance and payment of general average had been rejected. A copy of said notice of disallowance of claim is attached to the plaintiff's petition as exhibit B and is by reference made a part hereof.

17. Thereafter the plaintiff made application to the General Accounting Office for a review of the disallowance of said claim and for the allowance of said claim as a valid debt and obligation of the defendant herein. On or about December 10, 1928, the Comptroller General of the United States notified the plaintiff that the disallowance of said claim had been sustained and refused on behalf of the defendant to pay said claim or any part thereof.

18. In the years 1918 and 1919 it was, and still is, the general custom in adjusting general average for the debtor interests not to make payment of the amounts of their several contributions until after the general-average statement had been prepared and issued, and likewise for the creditor interests not to receive payment of their several contributions until after the general-average statement had been prepared and issued. Said custom applied to voyages in the Pacific Ocean and to ports in the Philippine Islands, including Manila.

19 *Conclusion of law*

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $48,099.40.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of forty-eight thousand ninety-nine dollars and forty cents ($48,099.40).

Opinion

WHALEY, Judge, delivered the opinion of the court:

This is a maritime claim and is governed by the rules of the maritime law as accepted and adopted by the courts of admiralty in this country.

The facts show that the vessel was owned and operated by the Government through the War Department. She was a public ship and used for governmental purposes. During the World War all, or most, of the private merchant ships which formerly operated in the Pacific Ocean were taken over by the Government through requisition and transferred to the Atlantic Ocean for the purpose of transporting troops and supplies to the Army in France. This resulted in a shortage, or absence, of all freight space in ships sailing to the Orient.

In December 1918 the Government agreed to transport, without hire, certain goods and chattels of the Red Cross, Philippine Government, and the Manila Railroad to the ports of Vladivostok and Manila on its Army transport, the S. S. "Logan." This vessel was carrying supplies to the U. S. Army in Siberia and the Philippines and also certain Army officers and their authorized allowances of baggage. The shipments of goods of the Philippine Government and the Manila Railroad Company were insured by the plaintiff against marine perils. On December 5, 1918, the transport "Logan" sailed from San Francisco, California, to Vladivostok, Siberia, and the Philippine Islands. After the ship had been at sea for over ten days, a fire broke out in the lower hold no. 1, and, to prevent the loss of the vessel and cargo, it was necessary to flood the hold with water from the deck and through the bilge pipes from the bottom. After the fire, some of the damaged cargo was jettisoned and the voyage was resumed. On December 22, only five days after

the resumption of the voyage, fire again broke out in the same hold and was not extinguished until the following day. As a result of this fire additional cargo was thrown overboard. Upon the arrival of the transport at the ports of destination, her cargo was discharged, and the master made delivery to the owners or consignees without taking bonds to secure payment of general average contributions by said cargo. There was no effort made to libel in rem the ship or cargo. Thereafter the plaintiff paid the Philippine Islands and the Manila Railroad Company the amounts of their respective losses, as due and payable under the policies of insurance, and became subrogated to their rights.

The War Department, acting through the Army Transport Service, employed Johnson & Higgins, average adjusters, on August 22, 1922, to prepare a statement of general average to determine the responsibility of the various parties. The general-average
20 statement was completed and issued by these adjusters on December 31, 1926, and showed the ship and cargo owned by the Government should contribute to the loss sustained through the destruction of the part of the cargo owned by the Philippine Islands and the Manila Railroad Company in the sum of $42,185.69.

The plaintiff, having paid the loss under the marine-insurance policies as an underwriter, brings this suit to recover from the defendant the contribution the ship and cargo owned by the Government should make in general average. Liverpool & Great Western Steam Company v. Phenix Insurance Co., 129 U. S. 397; Wager v. Providence Ins. Co., 150 U. S. 99; International Navigation Company v. Atlantic Mutual Insurance Company, 100 Fed. 304.

The defense interposed by the Government is (1) that the cause of action accrued upon the arrival of the vessel at the port of destination on January 19, 1919, and suit was not commenced until February 18, 1929, and (2) that the transport "Logan", being a public ship devoted to military service, the rule of general average is inapplicable.

This is an action in personam and not an action in rem. There was no attempt to libel the vessel or cargo owned by the Government. There has been no interruption by any process issuing from a court of admiralty to the freedom of action of the transport. No act of sovereignty over this ship has been touched. No process could issue from a judicial tribunal which could affect the movements of this instrumentality of the National Government. Briggs v. Lightboat Upper Cedar Point, 93 Mass. Reports, 11 Allen, 157. See also Workman v. New York City, 179 U. S. 552; Ex Parte in the matter of the State of New York, et al., 256 U. S. 503 and cases cited. It is important that this fact should be borne in mind while considering the legal questions involved. The material facts are not in dispute. The language in which some of these facts are expressed seems to occasion a slight dissension.

The defendant asserts that this court is without jurisdiction, for the reason the petition was filed more than six years after the ar-

rival of the vessel at Manila; in other words, that the cause of action to collect contribution in general average accrued upon the arrival of the vessel at the port of delivery of the cargo and not upon the completion and issuance of the general average statement made by the owners of the vessel. There is ample authority that were this a private merchant vessel a libel in rem could have been commenced against the ship by the cargo owners and by the ship owners against the cargo for contribution in general average upon arrival at destination. Dupont v. Vance, 19 How. 162; Wellman et al. v. Morse et al., 76 Fed. 573.

Under the admiralty law it was the duty of the master to take security bonds from the cargo owners for general-average contributions before delivery of the cargo to owners or consignees. "The Santa Ana", 154 Fed. 800.

The master of the "Logan" did not require the execution of bonds. Bonds are taken in order to prevent the tying up of either ship or cargo and to forego the legal entanglements resulting from libels in rem. It is fair to assume that the master of the transport was aware that no libel in rem against a public ship could issue from an admiralty court. The plaintiff commenced this action in
21 personam seasonably from the issuance of the general average statement which the Government made, but the action would be beyond the limitation of time for the commencement of a suit in this court if the time commenced to run from the arrival of the ship at Manila. The jurisdiction of this court depends upon which date the claim first accrued. As there could be no attachment of the ship for the purpose of enforcing a lien for contribution in general average, there could only remain the liability of the ship and cargo for general average contribution through the right of action against the owners, if such remedy existed. If the "Logan" were a privately owned merchant ship, the lien on the ship and cargo would be inchoate until an average adjustment had been made and no action for a general-average charge could be maintained until the general-average statement had been prepared and issued. "The Allianca", 64 Fed. 871.

The Government was in duty bound to have a general-average statement prepared and, in performing this duty, it employed a recognized firm of average adjusters. The length of time taken for the compilation and rendition of this general average statement is readily explained when the circumstances of this case are considered. The adjusters were the agents of the owner of the ship and were acting for the Government. No action against the owner could be maintained until the liability was ascertained and, as it was the duty of the owner of the ship to the owners of the cargo to have a general-average statement prepared (Johnson & Higgins v. The United States, 287 U. S. 459), until this duty had been performed or a refusal by the owner to perform this duty, an action in personam would not lie. The general-average statement prepared by the owner is in the nature of an account stated and a right of action

accrues from the time of its submission. There are no cases directly in point for the reason that a lien attaches to private ships and no lien attaches to public vessels and this lien takes hold upon the arrival at destination. We have been unable to find a case where an action in personam was commenced upon the arrival of a ship at destination. As an action in rem gives a lien on the ship and cargo and an action in personam gives no such lien, the former is always employed to gain the advantage of security for payment of the loss or damage. The action in personam relies upon the responsibility of the owner alone.

The defendant relies on the case of Det Forenede Damp-skibs Selskab v. Insurance Company of North America, 31 Fed. (2d) 658. We do not consider this case as either controlling or actually bearing on the question here involved. There was no statute of limitations (in admiralty, laches) involved, but solely the question as to what period should govern the value of certain currency mentioned in the bonds given for general-average contribution. The learned judge correctly held that the value was to be fixed at the time the bonds were executed which was upon the arrival of the vessel at the port of destination. What was said about general-average adjustment was merely obiter and had no bearing on the only question involved. In our opinion, the true rule and the only one which appeals to reason and common justice is that set forth in the decisions in "The Allianca", supra; Leggett v. 500 Cases of Tomatoes et al., 15 Fed. (2d) 270; "The Emilia S. de Perez", 22 Fed. (2d) 585, 586; "The Ernestina", 259 Fed. 772, 773; "The Santa Ana", 154 Fed. 800, 802.

22 In "The Allianca", supra, it was held that no action for a general-average charge is maintainable until an average adjustment is made, though the lien thereof was previously inchoate.

In the Leggett case, supra, it was held that "until an adjustment is made, the lien under consideration is inchoate; it attaches, but its amount cannot be ascertained until adjusted."

In the De Perez case, supra, it was held that the owner of the cargo had a right in personam against the owner of the ship for his full share of the general-average statement. This case recognizes that there is a lien given by an action in rem which accrues upon arrival of the ship and before bonds are given in general average and in addition the owner of the cargo also has a right of action in personam against the shipowner for his full contributive share of what the general-average statement shows when it has been prepared and issued. The right of action in personam accrues upon the submission of the general average statement which has been prepared by the master (representing the owners) as required by the admiralty law.

It is our opinion that the plaintiff's suit in the case at bar is timely, having been commenced within six years required by the

statute from the date of the rendition of the general-average statement prepared by the adjusters employed by the defendant.

The important question for decision is the liability of the Government of the United States in general average for a loss occasioned by the shipment of goods on a ship which is a part of the armed forces of the Government and used solely as a public vessel. No freight money was charged or received by the Government for the carriage of these shipments. Under these circumstances, does the rule of the admiralty law apply, where a clear case of general average is apparent from the facts, were the ship a privately owned merchant vessel? The fact that the cargo was carried free does not enter into the question of general average liability. In Gulf Refining Co. v. Universal Insurance Co., 32 Fed. (2d) 555, the Circuit Court of Appeals, second circuit, said: "It is authoritatively settled that general average depends upon the event of a common sacrifice for the benefit of all who are or may be interested in the voyage—not upon the existence of different contributory subjects. Contribution is a consequence. Neither the absence of a cargo nor the common ownership of vessel and cargo will affect the application of the principle of general average."

In Montgomery & Company v. Indemnity Mutual Marine Insurance Co., Ltd., 1 King's Bench 734, 740, the true principle of general average is expressed as follows: "The object of this maritime law seems to be to give the master of the ship absolute freedom to make whatever sacrifice he thinks best to avert the perils of the sea, without any regard whatsoever to the ownership of the property sacrificed; and, in our judgment, such a sacrifice is a general-average act, quite independently of unity or diversity of ownership."

There are certain requisites to make a case of general average and the Supreme Court in the case of Barnard v. Adams, 10 How. 270, 303, has stated them most clearly as follows: "The law of general average has its foundation in equity. The principle that 'what is given for the general benefit of all shall be made good by the contribution of all' is recommended, not only by its equity but
23 also by its policy, because it encourages the owner to throw away his property without hesitation in time of need.

"In order to constitute a case for general average, three things must occur:

"1. A common danger; a danger in which ship, cargo, and crew all participate; a danger imminent and apparently 'inevitable', except by voluntary incurring the loss of a portion of the whole to save the remainder.

"2. There must be a voluntary jettison, jactus, or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril, periculi imminentis evitandi causa, or, in other words, a transfer of the peril from the whole to a particular portion of the whole.

"3. This attempt to avoid the imminent common peril must be successful."

In the "Star of Hope" case, 9 Wall. 203, the vessel was stranded for the purpose of saving the cargo and crew, and general average was decreed.

All the elements necessary to constitute a general-average case were present in the instant case. The fire on the transport was admittedly and obviously a common danger to ship and cargo; there was a voluntary sacrifice of a part of the cargo, Ralli v. Troop, 157 U. S. 386; the fire was extinguished and, as a result of the sacrifice, the transport and her cargo arrived safely at her destination. The primary element for general average is that there must be a common danger (fire) which threatens the safety of vessel and cargo. The obligations of general average do not arise from a contract of carriage or obligation to pay freight, but from the very fact that cargo is placed in a vessel and both proceed to sea and a common danger is encountered which is successfully avoided by a sacrifice of the interests of one of them. There is nothing unilateral about the doctrine of general average. It applies to both ship and cargo. In the "Star of Hope" case, supra, the ship was selected for the voluntary sacrifice and the cargo was made to contribute. Had the transport been selected for the sacrifice to save the cargo, the Government, as owner of the ship, could have recovered from the cargo saved its contributory share in the general average. The rule of contribution in general average is clearly set out in "The Roanoke" case, 59 Fed. 161, 163, as follows:

"The rule for contribution in general average is older than, and entirely aside from, the common law; is a rule both of equity and policy, which has come down through the centuries from an old Rhodian law, adopted in the Roman jurisprudence, and thence entered in the general maritime law. It appears to have been preserved in England without enforcement by statute. It applies only to shipping, and prescribes that in all cases of imminent peril to the whole adventure, where release is obtained by intentional sacrifice of any part for the benefit of the residue, contribution shall be made by the saved portions for that which was so sacrificed. The common peril takes from the master of the vessel his paramount obligation to his vessel owners and charges him with a joint agency for the owners of cargo and vessel, to act impartially, decide when a sacrifice is necessary, and select for sacrifice that which will best serve the interest of all to avoid the peril. This general-
24 average contribution is not dependent upon contract, but is 'built upon the plainest principle of justice' (3 Kent Comm. 233), and is aside from contract ('The Eagle', 8 Wall. 23): 'It is the safety of the property, and not of the voyage, which constitutes the true foundation of general average.' Insurance Co. v. Ashby, 13 Pet. 331. *The vessel is made to contribute, as well as the cargo saved, not because of its undertaking to carry, or out of*

any duty as carrier but because it had encountered peril and had been saved to the owners by a sacrifice of other property." (Italics ours.)

The fact that the Government received no freight hire for the cargoes of the respective shippers has no bearing on the question as to the liability of the ship to contribute in general average where a part of the cargo has been sacrificed to save both the ship and cargo. The obligation to contribute does not arise out of the contract of carriage but from participation in the common venture. A clause in a bill of lading providing that goods are carried at owner's risk does not bar contribution in general average. Swift & Co. v. Glasgow Steamshipping Co., 280 Fed. 910. See also Dibrell Bros., Inc., v. Prince Line, Ltd., 58 Fed. (2d) 959.

In an imminent peril to both ship and cargo, a part of the cargo was destroyed by the flooding of the hold of the transport "Logan" and the Government, as owner of the vessel, benefited by this sacrifice in the saving of its vessel and cargo, which otherwise would have been destroyed in whole or part.

The liability of the Government, as owner of the transport, for its contributive share in general average is clear. Repeatedly has the Government been held [illegible] in general-average contribution for goods belonging to the United States shipped on a merchant vessel. Brown v. United States, 15 C. Cls. 392; The Davis, 10 Wall. 15; United States v. Wilder, Fed. Cases, no. 16,694.

In the Workman case, supra, at page 573, the court said: "The prerequisite in admiralty to the right to resort to a libel in personam is the existence of a cause of action, maritime in its nature."

From the time the sacrifice was made and the ship arrived safely at the port of destination there was created a cause of action, maritime in its nature, and a right to a libel in personam, cognizable in a court of admiralty. "By the ancient and settled practice of courts of admiralty, a libel in personam may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libellee, or an attachment made of any personal property or credits of his: * * *" In re the Louisville Underwriters, 134 U. S. 488, 490. There can be no dubiety that the national Government is exempt from process in all courts. It cannot be sued without its consent. The Government has not consented to be sued for an action sounding in tort, but a claim for contribution in general average is based in equity and not tort. "Western Maid," 257 U. S. 419. All the cases from earliest time clearly show that, although there may exist a liability against a public ship for some maritime tort or principle of the admiralty law, nevertheless, there can be no redress because of the sovereign's exemption from suit. "The Siren," 7 Wall. 152; United States v. Wilder, 3 Sumner 308; "The Davis," 10 Wall. 15.

In most, if not all, of the cases the courts expressly state the lack of jurisdiction is entirely due because the Government has not consented to be sued. Workman v. New York City, supra. The

courts had no jurisdiction over the sovereign, no matter how great was the liability. The Government of the United States has consented to be sued on claims in the admiralty law and in 1887 Congress passed an act commonly known as the Tucker Act, 24 Stat. 505, 36 Stat. 1136, and by section 145 this court is given jurisdiction of "all claims founded * * * upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, *or admiralty* if the United States were suable." (Italics ours.)

"A liability of the owners in personam, however, is not dependent upon ability to maintain a proceeding in rem because of a maritime tort." Workman v. New York City, supra.

This is a maritime claim against the United States brought in this court acting as a court of admiralty, and, under the provision of the statute express jurisdiction is conferred. The Government has waived its exemption from suit and has given its consent to have an action in personam brought in this court for the redress of any liability not sounding in tort under the admiralty law. See Matson Navigation Company, 284 U. S. 352.

Having found that the Government is liable for general-average contribution, and that this court has jurisdiction, the only remaining question for decision is the amount which the defendant should contribute.

The defendant asserts the Government is only liable, if liable at all, for the actual amount paid by the underwriters to the insured. The plaintiff claims the full general-average contribution of the amount found due by the Government as owner of the vessel and part of the cargo as found by the adjusters by reason of the fact that the master failed to take bonds from the cargo owners, upon arrival at destination, for their respective shares of the general-average contribution and therefore the defendant, as the owner of the vessel, is responsible for the full contribution of all parties.

In the case of "The Santa Ana," supra, at page 802, the court said:

"It is well settled, however, that if the master fails to exercise the lien which by law he has on the goods of all shippers for their just proportion in the general-average contribution, and delivers the goods without requiring payment of a general-average bond or other security for the payment thereof, he and the shipowner become personally responsible for the full amount of the general-average contribution, which all interests should pay to persons aggrieved."

See also Heye v. North German Lloyd, 33 Fed. 60; Det Forenede Dampskibs Selskab v. Insurance Co. of North America, 28 Fed. (2nd) 449; and The Ernestina, supra.

Under the general-average statement, as prepared and issued by the defendant, as owner of the vessel, the contribution payable
26 by the United States as owner of the hull of the "Logan" was $22,213.88, and as owner of miscellaneous cargo of the

War Department $19,971.81, or a total of $42,185.69. In addition to this amount, the United States is liable for the additional sum of $5,913.71 for the contribution of other parties to the general average, because of the failure of the master to require bonds of the respective cargo owners.

The plaintiff is entitled to recover the sum of $48,099.40. It is so ordered.

Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

Green, Judge, took no part in the decision of this case.

27 VII. *Judgment*

At a Court of Claims held in the city of Washington on the 5th day of November 1934, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of forty-eight thousand ninety-nine dollars and forty cents ($48,099.40).

VIII. *Proceedings after entry of judgment*

On December 15, 1934, the defendant filed a motion for a new trial, and for argument of same.

On January 2, 1935, the plaintiff filed opposition to said motion.

On January 14, 1935, the court entered the following order on said motion:

ORDER

Motions enumerated below having come before the court, upon consideration thereof it is ordered this 14th day of January 1935 that said motions as follows be, and the same are, overruled:

K–58. Atlantic Mutual Insurance Co. Defendant's motion for new trial and request for oral argument thereon.

* * * * * * *

28 [Clerk's certificate to foregoing transcript omitted in printing.]

(Endorsement on cover:) File No. 39497. Court of Claims. Term no. 869. The United States, petitioner, vs. Atlantic Mutual Insurance Company. Petition for writ of certiorari and exhibit thereto. Filed April 12, 1935. File No. 869 O. T. 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1935

Supreme Court of the United States

Order allowing certiorari

Filed May 20, 1935

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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